

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARON MORRIS,

Defendant-Appellant.

UNPUBLISHED

January 19, 2012

No. 298146

Wayne Circuit Court

LC No. 09-024181-FH

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unlawfully taking possession of and driving away a motor vehicle, MCL 750.413, and fourth-degree fleeing and eluding a police officer, MCL 257.602a(2). He was sentenced to 11 months to 5 years' imprisonment for the unlawfully driving away a motor vehicle conviction and 11 months to 2 years' imprisonment for the fleeing and eluding a police officer conviction, to be served concurrently. We affirm defendant's convictions, but remand for resentencing.

Defendant was charged in two separate cases, one for carjacking and felony-firearm in Wayne Circuit Court No. 09-026241-FC, and the other for unlawfully driving away a motor vehicle and fleeing and eluding a police officer in Wayne Circuit Court No. 09-024181-FH. The circuit court consolidated the cases for trial, concluding that the charges in both cases arose out of the same transaction and involved the same vehicle, the same defendant, and virtually the same witnesses.

I. CONSOLIDATION OF CHARGES

Defendant first argues that the circuit court erred in consolidating the two cases. "[T]he court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). Joinder is appropriate when the offenses are related. MCR 6.120(B)(1). Whether joinder is appropriate is a mixed question of fact and law. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). This Court reviews the circuit court's factual findings related to the joinder issue for clear error and its interpretation of the court rules de novo. *Id.*

A panel of this Court addressed the issue of consolidation when defendant appealed his carjacking and felony-firearm convictions. See *People v Morris*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2011 (Docket No. 298087). In that opinion, this Court concluded that the circuit court did not err in granting the prosecution's motion to consolidate. This Court's opinion, in *Morris*, unpub op at 2, states, in part:

In order to be related for the purposes of MCR 6.120(B), offenses must be either part of 'the same conduct or transaction,' MCR 6.120(B)(1)(a), 'a series of connected acts,' MCR 6.120(B)(1)(b), or 'a series of acts constituting parts of a single scheme or plan,' MCR 6.120(B)(1)(c). If the offenses are not related, the court must grant a motion by the defendant to sever the charges. MCR 6.120(C). In this case, the offenses committed in the parking lot of the liquor store in Detroit and those committed during the high-speed chase in Dearborn Heights were related under the plain language of [MCR] 6.120(B).

In *Williams*, 483 Mich at 228-229, the defendant was charged with two narcotics offenses that were allegedly committed approximately three months apart. The Supreme Court held that the plain, unambiguous language of MCR 6.120(B)³ had superseded the Court's previous decision in *People v Tobey*, 401 Mich 147; 257 NW2d 537 (1977), by increasing the number of situations where joinder is appropriate. *Williams*, 483 Mich at 238. The *Williams* Court held that the defendant had no right to sever the charges stemming from the two separate events because '[i]n both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution.' *Id.* at 234. Here, defendant and his accomplices participated in a common scheme that included stealing the vehicle and then attempting to elude police capture. The events were also 'connected' and part of 'the same conduct or transaction' because the police chase directly resulted from the fact that defendant was driving a stolen car.

The acts fit clearly into the plain language of each of the three subsections of MCR 6.120(B)(1), the charges were related, and the trial court did not err in granting the prosecutor's motion to consolidate.

³The version of MCR 6.120 analyzed in *Williams* was slightly different from that in effect now, but the change to the court rule does not affect our analysis today.

We agree with the analysis in that opinion. Defendant committed a carjacking and was discovered several hours later driving the stolen vehicle. When police tried to pull defendant over, defendant sped up in an attempt to elude police, presumably because he was driving a stolen car. A high speed car chase ensued, and after crashing the stolen car into an abandoned building, defendant exited the car and fled on foot. These events are all connected and stem from the initial carjacking. In fact, the charges in this case are even more related than those in *Williams*, which stemmed from two separate events but involved the same scheme of criminal activity. See *Williams*, 483 Mich at 226. In this case, defendant's charges resulted from the same series of connected events that took place over the course of a few hours, and his actions were part of a single plan or scheme to steal a car and evade capture. Consolidation was appropriate.

II. SENTENCING

Defendant also argues that the circuit court departed from the sentencing guidelines range without articulating substantial and compelling reasons for doing so. If the sentencing court imposes a minimum sentence that is not within the guidelines range, it must articulate substantial and compelling reasons for departing from the guidelines. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003). In addition, the sentence must be proportionate to the severity of the defendant's conduct and his criminal history. *Smith*, 482 Mich at 318. The sentencing court must also explain how the sentence is more proportionate than a sentence within the guidelines would have been, including "why it chose the particular degree of departure." *Id.* If this Court concludes that the sentencing court did not articulate substantial and compelling reasons for the departure, we must remand for resentencing or an articulation of such reasons. MCL 769.34(11); *Smith*, 482 Mich at 304; *Babcock*, 469 Mich at 258-259.

When the upper limit of the sentencing guidelines range is 18 months or less, the sentencing court is required to impose an intermediate sanction; failure to do so is a departure from the sentencing guidelines and must be substantiated by substantial and compelling reasons. MCL 769.34(4)(a); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). Intermediate sanctions include jail, probation, house arrest, electronic monitoring, community service, substance abuse counseling, and mental health treatment. MCL 769.31(b); *Harper*, 479 Mich at 618-619. Notably, an intermediate sanction does not include imprisonment. See MCL 769.31(b); *Harper*, 479 Mich at 618-619.

In this case, the parties agree that defendant's guideline range was correctly scored as 0-11 months, and that a minimum sentence guideline range of 0 to 11 months is an intermediate sanction cell for a nonhabitual offender. See MCL 777.68. Because an intermediate sanction does not include imprisonment, the circuit court departed from the sentencing guidelines when it sentenced defendant to 11 months to 2 years' imprisonment for his unlawfully driving away a motor vehicle conviction and 11 months to 5 years' imprisonment for his fleeing and eluding a police officer conviction. See MCL 769.31(b); *Harper*, 479 Mich at 618-619.

The circuit court did not articulate substantial and compelling reasons for its departure, namely because it did not realize it was departing from the guidelines. After sentencing defendant, the circuit court stated, "[t]he sentences are consistent with the guidelines and do not constitute a departure." Consequently, we vacate defendant's sentences and remand the case so the circuit court can resentence defendant within the guidelines range, or articulate substantial and compelling reasons why a departure from the guidelines is appropriate.¹

¹ We acknowledge that resentencing in this case may seem moot because defendant's sentences of 135 months' to 25 years' imprisonment for his carjacking conviction and two years' imprisonment for his felony-firearm conviction from lower court file 09-026241-FC were affirmed in *Morris*, unpub op at 4. No matter if defendant's sentence remains the same or is recalculated on remand, defendant will still serve the term in prison required by his larger

Defendant's convictions are affirmed but defendant's sentences are vacated and this case is remanded for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto

sentences in lower court file 09-026241-FC. However, the prosecution confessed error in the brief on appeal and at oral argument before this Court, specifically indicating that a remand was necessary. And, because the sentence in this case could be altered by a different sentence on remand, it is arguably not moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).